

CARTER ADMINISTRATION STANFORD DAILY ANNOUNCEMENT

BACKGROUND REPORT
BY
OFFICE OF MEDIA LIAISON
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THE LEGISLATIVE PROPOSAL

"Of all the basic rights that contribute to human development, none is more important than freedom of expression. That freedom is safe only when the press is free to give voice to it."

—President Carter. Telegram to Mrs. Lee Hills, Inter-American Press Association. 10/10/78

On May 31, 1978, the United States Supreme Court ruled in *Zurcher v. Stanford Daily*, that the Constitution does not prohibit a state from issuing warrants to search without notice for evidence in a place that is owned or possessed by someone not suspected of criminal conduct. The Court upheld the legality of a search of the *Stanford Daily* newspaper office for photographs of a 1971 campus demonstration even though the newspaper staff was not suspected of any criminal conduct.

The Carter Administration has concluded that the decision poses a serious threat to the ability of the press to gather information and to protect confidential sources.

President Carter, therefore, has announced that he will submit to Congress legislation that, with only limited exceptions, prohibits searches for the "work product" (such as notes, photographs, tapes, interview files) of persons preparing materials for dissemination to the public. Those receiving this protection would include reporters, broadcasters, freelance writers, and academicians. The restriction on searches would apply to federal, state and local officials.

The goal of the President's proposal is to protect broadly information-gathering activities basic to the First Amendment and still retain the government's authority to conduct essential searches and maintain public safety.

THE STANFORD DAILY DECISION: A REFRESHER

The case dates back to April, 1971, when police obtained a warrant to search the offices of the *Stanford Daily* student newspaper for photographs taken during a campus demonstration.

This Background Report is intended to provide information to assist you in informing the public. Please direct inquiries to Patricia Barrio or James Purks, 162 Old Executive Office Building, Washington, D.C. 20500 (202) 456-6623 or 2947.

The warrant for an immediate search was obtained even though the newspaper staff was not suspected of any criminal conduct in connection with the demonstration. Four police officers searched the student newspaper's photographic laboratories, filing cabinets, desks and waste paper baskets. The photographs sought were not found.

The *Stanford Daily* and various staff members filed a civil action in the U.S. District Court, alleging that the search deprived them of rights secured to them by the First, Fourth and Fourteenth Amendments of the U.S. Constitution. They claimed, among other things, that the search was a violation of the First Amendment because the ability of the press to gather and disseminate news is threatened by unannounced searches of newspaper files. The newspaper also claimed that it was improper under the Fourth Amendment to use a search warrant rather than subpoena to obtain evidence from persons not suspected of involvement in the crime under investigation. The case eventually reached the U.S. Supreme Court as *Zurcher v. Stanford Daily*.

The Supreme Court rejected the arguments of the newspaper and held that the Constitution does not prevent law enforcement officials from obtaining warrants to search without notice a person's business or home for evidence of a crime even if that person is not suspected of involvement in the crime.

At the same time, the Court said that Congress is not prevented from enacting protections beyond those required by the Constitution.

CONCERNS ABOUT THE DECISION

"The fundamental right of each person to read and write as he or she wishes is suppressed in many parts of the world, and is chronically endangered in others. In our own Hemisphere, some governments profess democratic ideals while denying the freedoms that make democracy work in practice. A free press — independent of government control

and expressing a variety of viewpoints — is crucial to both democracy and individual liberty."

—President Carter. Telegram to Mrs. Lee Hills, Inter-American Press Association. 10/10/78

The Supreme Court's decision immediately raised concerns in the Carter Administration and Congress about the potential threat to the time-honored freedom of the press.

The decision raised concerns including:

—The possibility of increased use of press searches.

—The possibility that confidential sources so valuable to the press would "dry up".

This would not only hamper the news-gathering activities of the press, but also have an adverse effect on law enforcement. The Administration believes that press protection helps law enforcement efforts because many "leads" and other information come from press accounts.

—The press might be deterred from recording and preserving tapes or notes for their news-gathering, reporting, and editorial activities if such information is subject to search.

—The potential that press operations would be physically disrupted by searches or "rummaging" by law enforcement officers.

For example, under the *Stanford Daily* decision, it would be possible that:

—essential confidential sources, such as the anonymous "Deep Throat" in the Watergate affair, might no longer come forward with important information because of fear that their identities could be discovered by police searches of newspaper offices.

—government whistle-blowers might not reveal local police or political corruption for fear that the officials they implicate may learn of their action through searches of reporters' files.

PRESIDENT CARTER'S LEGISLATIVE PROPOSAL

The issues raised by the *Stanford Daily* decision were of great concern to the President, the Vice President, and the Attorney General. President Carter immediately named a special task force under Attorney General Griffin Bell to study the issue and submit recommendations.

As a result of the study, the President will propose legislation with the following major provisions:

Restriction on Issuance of Search Warrants for Work Product

The President's proposal would prohibit a search for, or seizure of, the notes, photographs, or other "work product" of a person possessing such materials in connection with the dissemination to the public of a newspaper, book, broadcast or other similar form of public communication in or affecting interstate or foreign commerce.

Work product would consist of any documentary materials created by, or for, an individual in connection with his or her plans for disseminating information to the public. It includes notes, photographs, tapes, outtakes, videotapes, negatives, films, interview files, and drafts. Work product does not include materials which constitute contraband or are the fruits or instrumentalities of a crime.

There are only two exceptions to the rule prohibiting searches of work product. A search or seizure of work product is permissible if (1) the person possessing the material has committed or is committing the criminal offense for which the evidence is sought, or if (2) immediate search and seizure is necessary to prevent death or serious bodily injury to a human being.

Subpoena-First Rule for Non-Work Product Documents

Documents which are held for publication but are not work product would receive the

protection of a "subpoena-first" rule. Non-work product documents are those which were not created by or for the press, or are contraband or fruits or instrumentalities of a crime. Non-work product documents would include such items as an extortion note or film of a bank robbery taken by a hidden bank camera. With limited exceptions, in all cases where non-work product documentary evidence is sought, the subpoena process would have to be followed without a search until all appellate remedies were exhausted.

The exceptions are for situations where (1) the person possessing the materials has committed or is committing the criminal offense for which the evidence is sought; or (2) the immediate seizure of the material is necessary to prevent death or serious bodily injury to a human being; or (3) giving notice pursuant to a *subpoena duces tecum* would lead to the destruction, alteration or concealment of the materials; or (4) delay in an investigation or trial occasioned by review proceedings after an initial court order to deliver the documents in response to a subpoena would threaten the interests of justice. The possessor of the material would, under the fourth exception, be given notice and an opportunity to submit an affidavit setting forth the factual basis for any contention that the materials sought are not properly subject to seizure.

The "subpoena-first" rule would further protect against rummaging through files that may contain sensitive work product documents while permitting law enforcement officers to obtain critical documentary evidence such as an extortion note.

QUESTIONS AND ANSWERS

Q. Who would be protected by the President's proposal?

A. The proposal provides protection to a broad class of persons. Protection is given not only to members of established newspapers, but also to free-lance writers, radio and television stations, magazines, academicians, and any other person possessing materials in connection with the dissemination to the public

of a newspaper, book, broadcast or other form of communication in or affecting interstate or foreign commerce. Such broad protection avoids the difficulty of trying to define the "press," a problem that contributed to the inability of Congress to agree on a federal shield law for the press.

Q. Why does the Administration give work product special protection?

A. These materials are central to the work of journalists and authors. By focusing on those documentary materials that we believe *must* receive protection, we are able to keep exceptions permitting a search to the barest minimum. This focus permits us to extend coverage to all persons who are engaged in the dissemination of information through a medium in or affecting interstate commerce. The Administration's proposal also offers a substantial subpoena-first protection to other documentary materials held by a person in connection with his or her plans to disseminate information.

Q. What does work product include?

A. Work product includes the notes, photos, negatives, tapes, videotapes, outtakes, films, interview files, drafts or other documentary materials created by or for an individual in connection with his or her plans to disseminate information except such work product as constitutes contraband or fruits or instrumentalities of a crime. The materials need not be prepared for publication in order to receive protection as long as they are maintained in connection with plans to publish. The proposal's protection of work product would, for example, bar any search for, or seizure of, a reporter's notes relating to tips about fraudulent deals provided by a government whistle-blower, the unpublished photographs of a demonstration.

Q. Would your proposal have protected the Pentagon Papers against search?

A. The proposal permits a search or seizure of documents if the person possessing the materials has committed or is committing the criminal offense for which the evidence is

sought. Therefore, a search would be permissible if the government were investigating the newsperson involved for the crime of unauthorized possession of national defense materials set forth in 18 U.S.C. 793(e). All but one of the many bills introduced in Congress contain a similar exception and would also permit a search for the Pentagon Papers. It is important to note that in the more than 60-year history of that espionage statute, the federal government, to the best of our knowledge, has never prosecuted a newsperson for such conduct. Moreover, any legislative attempt to preclude a search for the Pentagon Papers might also prevent the prompt retrieval of secret strategic information about missile sites that we would want to secure as quickly as possible.

Q. How would the proposal be enforced?

A. The proposal creates a civil damage action in favor of any person subjected to a search in violation of the requirements of the statute. Violations committed by federal officers and agents would be governed by the procedure contained in amendments to the Federal Tort Claims Act that have been proposed by the Administration. That procedure combines a damage action against the federal government with administrative sanctions where warranted against the offending individual officers. Violations committed by local or municipal employees would trigger a damage remedy against the governmental body employing the local law enforcement official. Obstacles posed by the Eleventh Amendment rights of the states would preclude the creation of a damage remedy against the state governments as part of federal legislation. As a result, the Administration proposal would create a damage action against the offending state officer unless and until the state passed legislation of its own substituting the state for the individual officer as the party responsible for the payment of damages to the victim of the search.

Q. Does the proposed legislation apply to the states?

A. Yes. The proposal applies not only to federal agents, but also to state and local officials. The search in the *Stanford Daily* case and other searches of press offices were conducted by state and local police rather than federal agents. A proposal limited to the federal government would not be responsive to the problems raised by the *Stanford Daily* case.

Q. Why doesn't your proposal extend protection against searches to all parties not suspected of involvement in the crime under investigation?

A. The subject of so-called "third party" searches is being carefully analyzed by the Administration. Our review has revealed numerous complexities that we believe require further study. We have determined that a proposal to provide needed protection against searches for First Amendment materials should not be delayed while we continue to analyze the third party issue.

A number of difficult questions are presented by the issue of third party searches. Extending our proposed restrictions on searches to all persons not suspected of involvement in the crime under investigation may encourage criminal suspects to conceal

evidence in the "sanctuaries" of third parties. And some third parties, who may or may not be involved in the crime, may be sympathetic or closely related to the criminal suspect and hence may impede the efforts of law enforcement officers to obtain necessary evidence.

Even if an attempt is made to focus only on special "confidential" relationships that might be threatened by police searches (such as the lawyer-client or doctor-patient relationship), it is difficult to ascertain which groups or relationships should be selected for protection. There is, for example, great variation among the states in the selection of relationships that receive special protection, as well as in the degree of protection given.

Finally, extending protections against state and local searches beyond the boundaries of the Administration's proposal raises complex constitutional questions which are still under Administration review.

In light of these complexities, we believe that further study is necessary, and we are committed to continuing that study. In the meantime, we have determined that the *Stanford Daily* decision poses such a serious threat to the press that our proposal to provide needed protection should not be delayed.

APPENDIX A The General Approach for Press Protection

The Administration proposal would prohibit a search for, or a seizure of, the notes, photographs, or other work product of a person possessing such materials in connection with the dissemination to the public of a newspaper, book, broadcast, or other similar form of public communication in or affecting interstate or foreign commerce.

"Work product" would consist of any documentary materials created by or for an individual in connection with his or her plans for dissemination of information to the public, including notes, photographs, tapes, interview files, and drafts, except such materials as constitute contraband or the fruits or instrumentalities of a crime.

There would be only two exceptions. The proposal would not forbid a search for, and seizure of, press work product if the person possessing the material has committed or is committing the criminal offense for which the evidence is sought or if the immediate seizure of the material is necessary to prevent the death of or serious bodily injury to a human being.

The few documents which are held for publication but are not work product -- because they were not created by or for the press or because they are fruits or instrumentalities of a crime -- would receive the protection of a "subpoena-first" rule. With limited exceptions, in all cases where non-work product documentary evidence is sought, the subpoena process would have to be followed without a search until all appellate remedies were exhausted. The exceptions are for situations where: the person possessing the materials has committed or is committing the criminal offense for which the evidence is sought; or the immediate

seizure of the material is necessary to prevent the death of or serious bodily injury to a human being; or the giving of notice pursuant to a subpoena duces tecum would lead to the destruction, alteration or concealment of the materials; or delay in an investigation or trial occasioned by review proceedings after an initial court order to deliver the documents in response to a subpoena would threaten the interests of justice. The possessor of the materials would, in the last case, be given notice and an opportunity to submit an affidavit setting forth the factual basis for any contention that the materials sought are not properly subject to seizure.

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